Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,
Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and THE UNITED STATES OF AMERICA,
Appellees.

BRIEF FOR APPELLANT

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This is an appeal by Allen Calculators, Inc., a corporation,[1] from a judgment entered November 16, 1943, in the District Court, Southern District of Ohio, Western Division, in Equity Case No. 6802, *United States of America* v. *National Cash Register Company*,[2] refusing Allen leave to intervene (R. 16).

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[1] Allen Calculators, Inc., will be referred to as "Allen"; Allen-Wales Adding Machine Corporation, as "Allen-Wales."

[2] Referred to as "Cash."

There Is No Reported Opinion

The judge rendered no written or formal oral opinion (R. 40). He declined, though requested (R. 41), to state in the entry denying leave to intervene the ground of refusal (R. 40-3). His reason for not permitting intervention must, therefore, be deduced from the record. This will disclose that the sole basis for the refusal, after tentative intervention had been granted, was that the original controversy had culminated in an injunction decree obtained in 1916 by the United States in an anti-trust suit against Cash, which decree allowed Cash to petition for modification in certain respects; that Cash had petitioned, and so the only parties with standing in a hearing to determine whether modification should be granted, were the United States and Cash.

Concise Statement of Grounds of Jurisdiction

The jurisdiction of this Court to review by direct appeal the order and judgment entered in this cause is conferred by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., Sec. 345, commonly known as Sec. 238 of the Judicial Code, as amended, and by the Act of February 11, 1903, 32 Stat. 823 (as amended by the Act of March 3, 1911, 36 Stat. 1167), 15 U. S. C., Sec. 29, commonly known as the Expediting Act and reading:

> "In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. . . ."

In *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 505, the Court interpreted the above section as permitting appeals direct from denial of motions to inter-

vene. Denial of right to intervene is "the final decree of the district court" so far as concerns the litigant denied intervention.

Statement of the Case

The court, on the morning of November 15, 1943, at the opening of court and at the outset of the hearing on Cash's petition, allowed Allen's intervening answer to be accepted conditionally and filed conditionally (R. 29-30), to which Cash excepted (R. 30 top). This was after Cash's objection, as follows:

> ". . . We very strongly object. This is a suit between the United States and the National Cash Register Company. We have just seen this answer. There isn't anything that the United States can't raise and isn't prepared to raise, but we don't see where this company has any standing as a party to this suit."

and the Government's statement:

> "Mr. Meyers: Your Honor, the Government has no objection to the Allen Calculators Company's application to intervene in this, because we feel that the federal rule is specifically Rule 24(b)(2), which supports an application to intervene at this time" (R. 29).

Opening statements were made on behalf of Cash, the Government and Allen (R. 30-34). Cash has caused to be included in this record the opening statement on behalf of Cash (R. 65-72), the opening statement for the Government (R. 72-74) and a "Further Statement on Behalf of Petitioner" (R. 74).

Counsel for Allen stated (R. 30 bot.) Allen, which the court had "conditionally or tentatively allowed to intervene," was an independent dealer, and it was thought the position of the independent dealer could be well presented

by Allen and by Mr. Allen in particular; also, Allen feared the proposed acquisition of Allen-Wales would be destructive of Allen. Attention was called (R. 31 top) to paragraph Second, subparagraph (p) of the decree (R. 5); that it forbade acquiring ownership of a competitor engaged in the business of "cash registers or other registering devices," together with the fact that Allen-Wales manufactured a cash register, or, at least, a "cash register or other registering device" and was in direct competition with Cash. The Allen-Wales cash register with an adding machine ordinarily superimposed was asserted to be a complete cash register (R. 31).

Counsel for Allen stated further, the petition to modify must be read in the light of Cash having been found guilty of illegal acts and having been enjoined from performing them, and the effect of the identical thing, referred to in a case, in this court, to be cited. (This was *United States* v. *Swift & Co.*, 286 U. S. 106.) Next, it was observed that under Second (p) of the decree, there could be relief only if there was no substantial diminution of competition as the result of the purchase and if the plant desired would "supplement the plant" of Cash. It was then contended (R. 32 top), that, as Cash already had accounting machines, the plant desired to be acquired would not supplement the plant or facilities of that corporation.

When it was further stated that Allen and Allen-Wales, operated through dealers and Cash on the agent system, the court asked on what theory Allen asserted there was a right to intervene (R. 32), saying it appeared a little unusual and this was a kind of a semi-Government proceeding in which the Government, on behalf of everybody, was opposing the confirmation of the sale. Counsel for Allen (R. 32 bot.) replied, intervention was proper where parties in interest would be affected by the decree and

repeated that in this case Allen was an independent dealer having particular knowledge of the effect this transaction would have upon the lessening of competition and the lessening (sic, increasing) of the interference with its own business; that the Government had no objection, that the proposed intervention was, therefore, in subordination to the Government and that, as Allen was in the field and had an opportunity to know the thing well, its position should be represented, as was permitted in the *Swift* case where, the court was told, the Grocers Association was allowed to intervene (R. 33). The court then said:

> ". . . here is a proceeding between two private parties and you are a competitor and of course you may not like it, but what I wanted to do is to get your views and then between tonight and tomorrow to have any authorities to support your position" (R. 33).

Counsel for Allen said these would be supplied (R. 33). Counsel for the Government then made a somewhat comprehensive argument in behalf of the intervention, stating he thought the application met the necessary procedural and substantive condition for intervention (R. 34).

Subsequently, Cash handed up for filing, with the approval of the Government, an undated stipulation (Petitioner's Exhibit 1, R. 35, 45). The following occurred (R. 35):

> "Mr. Seasongood: We would like to see that.
>
> "Mr. Meyers: It admits certain allegations in the petition that we have agreed to.
>
> "Mr. Seasongood: Your Honor, we haven't had an opportunity to study this at all.
>
> "The Court: Of course, as I say here, you are in here cooperating with the Government. The Government has stipulated and for the sake of saving time

we will be recessing in ten or fifteen minutes and you can see it.

"Mr. Garver: Your Honor, that is why we object to this intervention.

"The Court: We will go along. I think you have stated your position relative to the intervention.

"Mr. Seasongood: Of course, our rights will be preserved as to everything that is offered that they have stipulated.

"The Court: Without opening your mouth you have an exception to everything that takes place here.

"The stipulation so offered is made part of this record, marked *Petitioner's Exhibit No. 1.*"

Later, Section 16 of the Clayton Act was called to the court's attention by counsel for Allen as additional reason for right to intervene (R. 35-6). When a chart showing dollar value sales of adding machines in 1941 was introduced by Cash, including sales by Allen, the following transpired:

"Mr. Garver: This chart, your Honor, shows in 1941 the total sales of adding machine were $31,822,000.

"Mr. Seasongood: So far as this represents the R. C. Allen Company this is incorrect.

"The Court: It is correct?

"Mr. Seasongood: It is incorrect. According to Mr. Allen, the figure is incorrect.

"Mr. Graydon: Do you want to correct it?

"Mr. Seasongood: Sure. I want to come in to see that it is corrected" (R. 36).

At the afternoon session (R. 37 top), after Cash had presented its witnesses and exhibits and closed its case, the Government offered no testimony by way of witness, deposition, interrogatories or otherwise, but presented a folder (id.) containing questionnaire sent by the Government to forty-three Allen-Wales dealers with twenty-two replies (R. 38 bot.)

"in support of the stipulation . . . for the inspection of the Court" (R. 37).

Government counsel added:

"The stipulation provides that this is offered for inspection by the Court, and also that National's counsel can offer any comments on the communications that they desire to" (R. 37).

Objection was made by Cash thus:

"We reserve objection to those, on the ground of materiality and relevancy. We agreed that they could be put in and examined by the Court, but we do want to register an objection to them as being immaterial and irrelevant" (R. 37).

There followed a discussion between counsel for the Government, Cash and the court, ending with the folder being

"made part of this record as Government's Exhibit No. 105" (R. 39)

as was a folder on behalf of Cash (R. 39).

The court questioned the propriety of the letters as not under oath and received them conditionally to enable the Government to make up the record (R. 39). In the colloquy relating to admissibility of the letters, Cash took the position that

"the only question before the Court is whether there is any substantial competition between the corporation which is making the purchase and the corporation which is being sold, and if the result of the acquisition would be to substantially lessen competition between those companies" (R. 37).

The court also seemed to be of this opinion (R. 37-8). The Government's form letter appears at R. 49-50; three sample letters in reply at R. 51-54.

Later, Government counsel queried if Allen's status would permit them to put their Mr. Allen on (R. 40 top) and asked:

> "What is the status of the intervenor at this time?"

The court then refused intervention in language (R. 40) indicating that because the original proceeding was by the United States against Cash and the court was passing on the decree which grew out of the litigation at that time between those parties, it would be unreasonable, at the time of petitioning many years later for modification of the decree, to permit intervention by one not a party to it (R. 40).

This ended participation by Allen, which was thereafter treated as being out of the case. Allen's right to intervene was disposed of adversely without opportunity for further argument regarding such right or opportunity to furnish in support of its position authorities which, in the morning, the court had said might be furnished between adjournment in the afternoon and next day's session.

In the course of the Government's argument (R. 85-104), the court indicated rather clearly that it failed to see anywhere in the record any suggestion of restraint of trade (R. 89), and in saying it had been held, in this court,

> "5% cannot be construed as substantially limiting competition" (R. 90),

seemed to be adopting Cash's theory that the test of permissibility was then existing competition between buyer and seller, notwithstanding the competition was in its incipiency: that the public generally would benefit by this

acquisition (R. 91) and so the fate of the group of small dealers could not be considered. The court said (R. 95):

> "If this were an original action that was unlimited it would be different, but you want again to come back to the fact that we have a decree that was entered some thirty years ago, and that is the controlling factor."

The Government, in argument, stated its position as non-adversary, thus (R. 86):

> "And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation."

Again, when the court said (R. 99):

> "I was just going to ask a question. Do you want to supplement this argument with a brief, in view of what has gone on here now, the suggestions that have been offered? I say, in view of the suggestions here, that is, the Government's position, that if this purchase were permitted to be consummated it would substantially lessen competition and violate the anti-trust law and the Clayton Act."

the non-adversary attitude of the Government was repeated.

> "Mr. Moyer: Violate the decree. I mean I even don't like to use the language 'in violation' here. We believe that the Court should be fully and completely informed, and we are attempting to do it to the best of our available facilities and knowledge. So if the Court will——
>
> "The Court: ——I don't see what else you could furnish. I think the statistics right down to the minute have been furnished, and I don't see what else the Government could do to add to the case.
>
> "Mr. Moyer: We had the alternative of calling a hundred or a hundred and fifty independent distributors. We couldn't do that under the circumstances.
>
> "The Court: Suppose you did that and the other side called ten thousand to prove they had been benefited. We would be back to where we started."

A brief was to have been filed on behalf of the Government (R. 104), but apparently the court decided to allow purchase without briefs being filed.

At the opening of the morning session on November 16, 1943, Allen presented an entry satisfactory to the Government (R. 41 top) overruling the motion to intervene

> "upon the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered therein and the only parties involved in such controversy are the Government of the United States and the National Cash Register Company" (R. 41).

This was objected to by Cash and the court said:

> "If you will let me read it just a moment. (After examining entry): Of course, the point about it is I wouldn't want this entry to go on because, as I say,

> I gave you an opportunity to furnish authorities. Of course, you suggest the Clayton Act, but I wouldn't want this matter here to turn on that one ground alone. You can prepare an entry overruling your petition to intervene, and that is all there is to it, because we did not go into the matter fully" (R. 42).

And

> "I think that the record should show that the Court does not consider this entry fair, in that it has to be bound on that one ground without going into it fully' (handing document to Mr. Seasongood)" (R. 43).

Accordingly (R. 44) the ground of refusal was stricken from the entry submitted and (R. 100) the overruling order reads:

> "This cause came on to be heard at the opening of the proceedings on November 15, 1943, on the motion of Allen Calculators, Inc., for leave to intervene and to file an answer attached to said motion, copies of which motion and answer had been served on the United States Attorney General and the attorney for National Cash Register Company, and such motion was argued by counsel for the United States, The National Cash Register Company and movant, on consideration whereof the court overrules said motion; to which ruling Allen Calculators, Inc., excepts" (R. 16-17).

Allen's notice of application, proposed answer and order allowing intervention were identified (R. 43) as Proposed Intervenor's Exhibits "A," "B" and "C," respectively, and appear: Exhibit "A," R. 55; Exhibit "B," R. 56; Exhibit "C," R. 64. Allen's proposed answer (R. 56) showed the interest of Allen, both individually and as representing the independent dealers in preventing acquisition by Cash of the controlling stock of Allen-Wales.

Allegations included in the proposed answer are, in numbered paragraphs:

1. Allen, Allen-Wales and Cash are competitors.

3. The basic principles underlying cash register combinations, adding machines and the other articles enumerated in 1 are substantially the same.

4. Cash has the facilities to manufacture adding machines and there is no reason why it should not develop its own line (R. 57).

5. The real object of Cash in seeking to acquire Allen-Wales is to eliminate that company from the competitive field, and to increase the monopoly it had and has. In the last subparagraph of 5, attention is called to the plan of Cash to withdraw the manufacturing plant of Allen-Wales from Ithaca, New York, and to integrate it into the Cash plant at Dayton, disturbing the relationship of some four hundred employees in the Ithaca plant and the course of commerce from New York (R. 57). (This direct challenge of the purpose for which Cash was seeking acquisition and the statement of absorption and dislocation do not appear in the answer filed by the Government) (R. 14-16).

9. Within the independent companies, Allen had developed during the past few years by far the greatest volume of the combination adding cash register (R. 59).

11. The combined total sales of all independents increased each year and amounted to a total in excess of twelve thousand per annum. If Cash secured Allen-Wales, Cash

> "will be a formidable competitor against all independents, who will have reason to fear their competition" (R. 60).

12. Cash had acquired a strong competitor, Remington cash register, which had become such after February, 1916 (R. 60).

13. Acquisition about 1929, of control by Cash of the Ellis Adding-Typewriting Company with machines which contained the features of adding machines and billing machines (R. 60). [This is of importance (see R. 32 top) since Second (p) of the decree of February 1, 1916, permits acquisition only if such acquisition is "desired" to

> "supplement the plant, patents, machines, or facilities of the defendant corporation . . ." (R. 6). With purchase of Ellis no further supplement for adding machines was necessary.]

14 and 15 contrast the Cash agency and the independent dealer system of doing business and show that dealers handle one make of machine by direct dealing with the manufacturer, but handle all types of rebuilt machines and that the rebuilding of older machines is a profitable part of the business (R. 61).

16 to 19, inclusive (R. 61, 62), show various ways in which Cash, if permitted to invade the dealer field by purchase of Allen-Wales, could make it impossible for the independent dealer to compete.

20 shows the special personal interest of Allen and the confusion and loss of good will that would result if the trade should get the impression Mr. Allen had sold out to Cash. It was noted in this paragraph that he claims an interest in Allen-Wales through pending litigation.

21 shows why it would be dangerous to permit Cash to buy Allen-Wales "under any conditions" (R. 63). [Allen should have been allowed to develop this contention before the order of December 7, 1943 (R. 17) allowed acquisition on certain conditions included in 9 of that order (R. 19-21). But, this order was worked out by the court, Cash and Government counsel only, with Allen treated as a complete outsider and given no opportunity to present views or contentions respecting it.]

22 denies matters of substance in Cash's petition (R. 63-4) which are either not denied or not so clearly denied in the Government's answer (R. 14-16).

It will be seen, therefore, Allen's proposed answer tendered substantial issues.

On December 4, 1943, Allen filed its petition for appeal (R. 23), assignment of errors (id.) and jurisdictional statement (printed pamphlet). As shown in Allen's supplemental jurisdictional statement filed December 10, 1943 (pamphlet, p. 13), the court postponed action on Allen's appeal papers to December 6 and then until December 10, upon which date Allen's appeal to this Court was allowed (R. 24).

On December 7, 1943, the court entered its "Findings and Order" (R. 17) approved as to form by attorneys for Cash and for the Government. This entry grants the prayer of the petition on certain conditions (R. 19, par. 9). The Government has not appealed.

With Cash's statement in this Court, opposing jurisdiction, was filed a motion to dismiss or affirm. On February 7, 1944, further consideration of the question of jurisdiction was postponed to the hearing on the merits and the case was transferred to the summary docket (R. 108).

Specification of Assigned Errors Intended to Be Urged

All of the three assignments of error (R. 23-4) are intended to be urged, namely, (1) overruling motion for leave to intervene, (2) withdrawing leave to intervene conditionally, (3) failing to enter order in conformity with decision in refusing leave to intervene.

Summary of Argument

The appeal involves the right of a private concern, both specially affected and as representative of a class intended

to be protected in an anti-trust decree, to intervene, with the Government's consent, in opposition to modification of a consent injunction in such decree, to permit acquisition, by the company enjoined, of controlling stock of a competitor.

Rule 24 of the Rules of Civil Procedure is relied on by Allen as conferring right to intervene. It is printed as an appendix.

The decree of February, 1916 (R 1) was entered against National following convictions of its officers and agents in a criminal proceeding for violation of the anti-trust laws, and reversal with directions to award a new trial. *Patterson* v. *United States*, 222 Fed. 599 (C. C. A. 6, 1915), pp. 633, 634, 637, 639, 643, 650. It was charged National (pp. 611t, 623, 625) did from 80 to 95 per cent of the manufacturing and selling of cash registers. The proposed answer of Allen (R. 56, 57, bot., par. 5, 60, par. 12) set up that National still exercises predominant control in its field. The opinion in the criminal case, refers to evidence of the most flagrant character of illegal acts utilized for ruthless suppression of competition. The decree sought to be modified enjoins, in sub-paragraphs (a) to (p), inclusive (R. 2-5), a great number of such acts. Second (p) (R. 5) enjoins National from acquiring ownership or control by means of stock ownership of the whole or an essential part of the business of any competitor engaged in the manufacture or sale of cash registers or other registering devices, but provides in case any such acquisition is desired a petition may be presented to the court, which the court may allow. The paragraph Third (R. 6) of the decree is a usual one in anti-trust injunction cases. It retains jurisdiction of the cause for the purpose of enforcing the decree and of enabling the parties to apply to the court for modification.

By this decree, the court assumed control of the stock of all competing corporations so far as might concern acquisition of stock of any of them by National and, in effect, placed the "disposition of property in the custody of the court" within the meaning of Rule 24(a)(3) relating to intervention of right. The decree was intended for the protection of the public and of competitors. It is to be read in the light of the illegal acts found and enjoined. Even without the reservations in the decree, only the court which passed the decree had jurisdiction to modify it and to consider whether it should be modified. The jurisdiction of the court which entered the decree to modify it is, therefore, just as exclusive as a suit in rem or quasi in rem. No court has power to modify the decree of another court.

The decree gave appellant and independents generally doing business under the dealer system and competing with National, rights additional to those accorded them under the Sherman and Clayton Acts: it provided, for example, a proposed acquisition must supplement the plant, must be for that purpose, and dealt, not only with cash registers, but any other registering device. Thus it was more stringent than the anti-trust laws. It would not necessarily be a violation of these to acquire "an essential part of the business of a competitor" which would not supplement the plant of the acquirer. The decree, Second (p.), R. 5, however, prohibits such acquisition.

Appellant could not assert its rights in any other court. As before stated, it could not ask any other court to interfere with the discretion of the court which entered the decree to modify it. It could not sue under the Clayton Act in any other court, because that Act gives a remedy only against threatened violations. Here the violations had been enjoined. As the Clayton Act does give a remedy to prevent injury, inferentially it, as "a statute of the United

States confers an unconditional right to intervention" within the meaning of Rule 24(a)(1). Should the court modify the decree and permit acquisition, appellant's rights to protection would then be lost, if it were assumed these could have been asked of some other court. The contract for acquisition was signed subject to the court's approval. This being given would thus constitute a completed transaction. The Clayton Act (Sec. 16) does not relieve against completed transactions, but only against threatened injury from actions to be taken. *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916). As the Clayton Act gives a remedy by injunction against threat of special injury, it also confers by implication a right, through intervention, to prevent special injury by vacating an injunction.

Moreover, as a practical proposition, any other court than that in which the decree was passed would, if the hurdle of interfering with the decree of another court were surmounted, deny relief on some theory, such as that the suitor was precluded by representation of the United States through the decree in the principal case, *Wyoming* v. *Colorado*, 286 U. S. 494, 508-9, or on principles of comity or *stare decisis*, or by exercising discretion not to award equitable relief. To permit intervention under Rule 24(a)(2), it is not necessary to show conclusively that the representation of applicant's interest by existing parties is inadequate and the applicant is bound by a judgment in the action: a showing that the representation "may be inadequate" and that applicant "may be bound" by the judgment suffices.

Invoking Rule 24(a)(2) is not intended as a reflection on Government counsel. They, perhaps, considered the representation of the applicant's interest by existing parties might be inadequate, since they not only made no

objection to intervention but argued in favor of permitting it. Not all points mentioned in appellant's opening statement or proposed answer and which would have been presented had intervention been allowed, were noticed or developed at the hearing.

Also, as the decree of 1916 followed extensive and serious violations of law and was entered at the instance of the United States, a modification of the decree to permit acquisition and lessen competition should have been permitted, if at all, only after the fullest presentation of the facts to the court and not in the shape of informal communications presented to the court for its "inspection," especially after the court expressed disapproval of the letters as evidence (R. 39). A witness in Cincinnati might have been produced without undue inconvenience. If it was not desired to produce other witnesses farther distant, the depositions of Allen-Wales dealers might have been taken by the Government upon oral examination or upon written interrogatories.

The United States was certainly in an adversary position when it prosecuted National criminally and enjoined it. Why this adversary position should disappear on a petition for modification and the Department in effect be transformed into a "commissioner" (R. 45) is not apparent. It is a question whether the Government, after having assumed such non-adversary position, did not lose its right of appeal from the decree subsequently entered.

Rule 24 is to be liberally construed. In the problems of anti-trust enforcement, judges should be "willing to hear from more than the conventional parties in an adversary procedure" and should "accept economic testimony appropriate for laying down a broad rule of industrial government . . ." and ". . . frame decrees suited to the character of the many dimensions of the problem revealed."

Crosby Steam Gauge, etc., Co. v. *Manning et al., Inc.*, 51 F. Supp. 972, 974 (1943), Wyzanski, J.

Cases cited by opponents before adoption of the Federal Rules of Civil Procedure are distinguishable. Rule 24 amplified the right to intervention (notes of the Committee published by Government Printing Office, Document 101, p. 243), and "should be construed with great liberality." *Western States Machinery Co.* v. *S. S. Hepworth Co.*, 2 F. R. D. 145, 146. The rule dispenses with the requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, 459 (1940).

The refusal of leave to intervene in this case is appealable to this court. First, it is a final judgment in an anti-trust case. It is final because appellant could not seek to prevent modification of the decree allowing acquisition in any other court than that in which intervention was sought. If intervention is not obtained, that is an end of any rights Allen might have. It could not appeal from the decree of modification, no matter how erroneous and injurious. Second, the refusal of intervention was not discretionary, since under Rule 24(a)(1), "a statute of the United States confers an unconditional right to intervene" under the circumstances of this case; and the conditions for intervention of right under 24(a)(2) and (3) also exist. Third, if, contrary to the foregoing, allowance of intervention was discretionary, appeal lies from an unreasonable exercise of discretion.

The suggestion that the case has become moot because the decree was not superseded is untenable. The jurisdiction of this court is not so easily ousted. It exists whether an appeal is taken without supersedeas or with supersedeas (if it be assumed an appellant denied the right to inter-

vention may supersede a decree to which he is not a party). Allen excepted to the order of November 16, 1943, refusing it leave to intervene (R. 17). It filed its petition for appeal, assignment of errors and jurisdictional statement and served copies on National and the Government counsel, and requested the court to fix the bond for appeal on December 4, 1943. The court postponed the matter of allowance of appeal to December 6 and again on December 6 to December 10. (Pphlet. Suppl. Jur. St., p. 13.) The decree of December 7, allowing acquisition, was thus entered at a time when all steps which appellant could by then take for appeal had been taken and made a matter of record. The filing of the appeal papers constitutes a *lis pendens*. The appeal was perfected at the same term as soon as might be. When the decree of December 7 was entered, National and Allen-Wales and its stockholders had a right to proceed, but at the risk that the appeal from the order refusing appellant leave to intervene would be sustained. The statement inserted by the court in the order allowing appeal, that it did not supersede the Findings and Order entered December 7, 1943, is no more than is true in law without such statement. Allen could scarcely supersede a decree to which it was not a party any more than it could appeal from such decree to which it was a stranger. If a case becomes moot in the absence of supersedeas, then this court does not have jurisdiction (and, of course, it has) to review cases appealed without supersedeas.

ARGUMENT

I. Allen Was Entitled to Intervention of Right Under Rule 24(a)(1), (2) or (3).

As to 24(a)(1), Section 16 of the Clayton Act, properly interpreted, confers an unconditional right on one of a

class protected by an anti-trust decree to intervene in opposition to attempted injurious modification of it. The statute confers a right to injunctive relief in a United States Court against threatened loss or damage by a violation of the anti-trust laws. It does not in terms allow intervention in the cause where an injunction granted is sought to be vacated, in part, so as to cause damage to proposed intervenor. But if there is threatened loss or damage, and the court which passed the decree is the only one having jurisdiction of the proceeding for modification, then there is no right to seek injunction elsewhere, nothing to enjoin elsewhere, and the rights conferred by the Act must be asserted in that court. As said in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation et al.*, 320 U. S. 344, 350:

Courts will construe details of an act in conformity with its dominating general purpose, will read the text in the light of the context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

As to 24(a)(2), the representation of the applicant's interest by the Government may have been considered by the Government inadequate in view of the Government's request that applicant be permitted to intervene to show its special economic interest and that of the class of dealers to which it belonged. Besides, Allen tendered a showing of factors which were not presented or urged upon the court and of which the court should have had the benefit before deciding to permit acquisition, or on the protective sufficiency of the conditions in the decree. The court should have been more fully apprised of the very recent incipiency, 1940 (R. 47, 93t), rapid growth and real competitive nature of the so-called Allen-Wales adding cash drawer, for

instance, and that the acquisition of Allen-Wales removed the largest of the independent competitors (R. 90). Previous wrongdoing, not to be ignored when size has been utilized in the past, and opportunity for abuse, were not sufficiently considered by the court; nor, were warnings against modification in *United States* v. *Swift et al.*, 286 U. S. 106, 116, 117, bot.-18, and the rule also prescribed in that case that nothing less than a clear showing of grievous wrong should lead to change from what was decreed after years of litigation with the consent of all concerned (p. 119). See, also, *Chrysler Corp.* v. *United States*, 316 U. S. 556, 562.

The Government's case was informally presented by letters for "inspection" instead of valid evidence and the Government assumed a non-adversary or commissioner position. So, the representation of petitioner's interest may have been inadequate.

Likewise, when the court modified the decree over which it had retained jurisdiction, no other court would, if it could, give relief to Allen and it would be bound by the judgment. This result would be reached by one of a number of possible theories and reasons for denying relief. A court might say that the case was *res adjudicata* because the rights of the applicant were concluded by the applicant having been represented, adequately or inadequately, by the United States. The underlying reason for denying relief in an independent action would be the rule of comity which would preclude one court from attempting to interfere with a judgment of another modifying its decree under express terms of a reservation permitting modification. In *United States* v. *Lane Lifeboat Co., Inc., et al.*, 25 F. Supp. 410, 411, a suit by the United States against the Boat Company and its surety for damages because of patent infringement liability paid, the intervenor

had indemnified the surety company. The court said that Rule 24 should be liberally interpreted and, although the judgment would not directly bind the petitioner, it would, in the last analysis, do so indirectly. In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 8 F. (2d) 1011 (Ct. App. D. C.), the court held that when one court has acquired jurisdiction of the subject matter of a case, no court of coordinate authority is at liberty to interfere with its action and said, pp. 1011-12:

> "It is manifest that there are pending in a court of competent jurisdiction two suits involving the contracts upon which the claims submitted to the Comptroller General are based. If, as suggested by appellant, that court should be of opinion that the assignment to the United States was subject to all existing equities, and that the claim here involved is not in law a claim against the United States, notwithstanding the assignment, then there would be no necessity for the writ. But, whatever may be the decision of that court, it having acquired jurisdiction of the subject-matter of this case, no court of coordinate authority is at liberty to interfere with its action. This principle is so familiar as to require no citation of authorities."

Certiorari was granted, 270 U. S. 637, and the case was affirmed on other grounds, 275 U. S. 1.

As to 24(a)(3), while the stock of competing companies is not physically in the custody of the court, it is, by the reservations of the decree so far as relates to acquisition by National, constructively in the custody of the court and the applicant is so situated as to be adversely affected by the permitted disposition of such property. In *Wabash R. R.* v. *Adelbert College of the Western Reserve University*, 208 U. S. 609, on petition for rehearing and motion to modify the judgment, leave was asked to permit the judg-

ment of the Ohio court to stand to the extent that it would not involve interference with the constructive possession of the federal court. The request was denied. It is recognized that the rule of that case refers to exclusive jurisdiction resulting from seizure or beginning of an action looking to seizure of property. But, by liberal interpretation, there will be a disposition of property (cf. *Herbert's Est.* v. *Commissioner,* 139 Fed. [2d] 756, 758, 2 Cir.) in the custody of the court, when, after a court, at the instance of the public authorities, has enjoined acquisition of such property with express reservation of right to modify the decree, the court entertains an application of the party enjoined to modify its decree, and permit the disposition by purchase of such property.

II. If Allen Was Not Entitled to Intervention of Right Under 24(a), It Should Have Been Permitted to Intervene Under 24(b)(1) or (2). An Appeal Lies Where, as Here, There Was an Unreasonable Refusal of Permission to Intervene.

As to 24(b)(1), if Section 16 of the Clayton Act does not, as we contend it does, confer an absolute right of intervention, inability to assert rights under that statute in any other court confers a conditional right to intervene.

As to 24(b)(2), the applicant's defense and the main action have questions of law or fact in common.

The exercise of discretion by the court is reviewable by appeal in this, as in other cases, where the discretion of the court has been held to be reviewable. Thus, in *N. L. R. B.* v. *I. & M. Electric Co.*, 318 U. S. 9, 16, 30, it was decided that under Sec. 10(e) of the Act, an application to adduce additional evidence is addressed to the sound judicial discretion of the court and the question was said to be, did the court act arbitrarily or abuse its discretion. It was

found the order was not arbitrary or unreasonable or an abuse of discretion, but the right of review was not questioned. See, also, *Ohio Oil Co.* v. *Conway*, 279 U. S. 813.

In *City of New York* v. *New York Telephone Co.*, 261 U. S. 312, decided in 1923, before the Rules of Civil Procedure were adopted, at p. 317, the court, after reviewing previous decisions, said:

> "These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, . . ."

See, also, to the same effect, *State of Washington* v. *U. S. et al., Columbia R. Packers Ass'n. et al.* v. *Same*, 87 Fed. (2d) 421, 433, 434, 435, C. C. A. 9 (1936).

In *In re Engelhard & Sons Co.*, 231 U. S. 646, cited by opponent, intervention of a customer of the telephone company was allowed to permit petitioner to assert its own claim (p. 649) and with the right to renew its application when making it appear it had authority from other specifically named claimants to represent them. Cf. *Louisville Tr. Co.* v. *Louisville, Etc., Ry. Co.*, 174 U. S. 674, 685, 686.

The reason why a refusal of leave to intervene is usually regarded as discretionary and not final is because, in the ordinary case, denial of the application does not prejudice the applicant, who can assert his rights in another court. This is stated in *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315. But it is also stated (p. 315) that it is doubtless true cases may arise where the denial would be a practical denial of relief which can only be obtained by intervention, as in the instance where there is a fund in court and the refusal is not discretionary there. As we have shown, while there is not here a fund in court, there is exclusive jurisdiction regarding an acquisition of stock in the court where intervention was sought.

In general, permission for intervention has been wisely and liberally accorded to private concerns representative of a class or especially interested. As recent examples, in *Eastern-Central Motor Carriers Ass'n.* v. *United States*, U. S. , 64 S. Ct. 499, 501-2, note 5, this Court allowed the National Industrial Traffic League to intervene. In *McLean Trucking Co., Inc.* v. *United States, et al.*, U. S. , 64 S. Ct. 370, 372, note 2:

> "Other motor carriers, shippers and shippers' organizations intervened in the proceeding, as did also the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

In the suit to set aside the Commission's allowance of merger, the Secretary of Agriculture and the American Farm Bureau Federation intervened as plaintiffs. In that case, the statute (p. 374) requires giving notice and reasonable opportunity for interested parties to be heard; and authorizes and in certain instances requires the Commission to set the application for public hearing. Such public hearing procedure might well be employed by a court when asked to vacate an anti-trust injunction against stock acquisition.

III. The Suggestion, Now Made in Opposition, That the Motion to Intervene Was Not Timely Is Not Supported by the Record, and, Moreover, Is Not Available to National.

As previously stated, if this objection had been made, the timeliness of the motion to intervene would have been shown. Without going into the matter unduly at this time, it may be stated that the answer of the United States was not filed until Thursday, November 11 (Armistice Day) (R. 14), and the hearing was Monday morning, November

15 (R. 28, 29). The petition to modify (R. 8 iv) stated that the contract would be exhibited to the court at the hearing. It was not available to appellant for examination before the hearing (R. 35). Neither was the stipulation between the Government and National (R. 35). Interventions are not allowed to impeach a decree already made. *United States* v. *California Canneries*, 279 U. S. 553, 556. Surely, for the convenience of all parties, an application for leave to intervene is suitably made when presented at the very opening of the proceedings. The Government, in subordination to which appellant sought to intervene, urged, when the application was made, that the application met all the conditions of Rule 24 and should be granted (R. 34).

In *Leary, Admx.* v. *United States*, 224 U. S. 567, the decree was reversed for refusal, because of supposed laches, to permit intervention. The opinion by Justice Holmes ends (p. 576):

> "On the whole matter it seems to us that she was dealt with too technically. In the circumstances it seems to us that the leave to intervene may be granted subject to the condition that the evidence already in shall be taken to be evidence against her subject to her right to recall and cross-examine such witnesses for the Government as she may be advised."

The last sentence of Rule 24(b) requires:

> "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The court below did not consider whether the intervention would unduly delay or prejudice adjudication of the rights of the original parties. There was no proof by Cash of delay or prejudice and the Government had affirmatively said (R. 34) there was none.

It was not until well on in the afternoon session (R. 37 top, 40) that the court withdrew the conditional intervention granted at the beginning of the morning session and ruled Allen could not intervene. The ruling then was wholly unrelated to timeliness or prejudice to the rights of the original parties.

Also, this was before the time previously accorded Allen for citation of authorities (R. 33) and without having the benefit of authorities (Cf. *Illinois Steel Co.* v. *Ramsey et al., Same* v. *Aigler et al.*, 176 Fed. 853, 863, C. C. A. 8, [1910], where somewhat similar action was disproved.)

The court should, as requested, have made an entry giving its reason for refusing intervention, namely, supposed lack of status to intervene. The failure to do this is assigned as error (R. 23, 24). But the reason for the court's refusal is, from the record, nevertheless, patent.

IV. The Case Is Not Moot.

A case may be appealed with or without supersedeas. Allen could not appeal from the order of December 7, 1943 (R. 17), regarding which it was not consulted and to which it was not a party. What Cash may have done under that order is not in the record and statements of counsel in their briefs here are not substitutes for evidence. But, however that may be, one who acts under a decree before time for all appeal has elapsed, does so at its own risk. He cannot oust the jurisdiction of the appellate court by so proceeding.

As matters now stand, the petition of Cash for leave to acquire Allen-Wales has been granted on certain conditions (R. 19, par. 9). Acquisition under any conditions should not have been permitted despite the findings in par. 8 (R. 19), because, among other reasons:

1. "An essential part of the business . . . of . . . a competitor"

will not, in this instance, Allen asserts,

> "supplement the plant, patents, machines or facilities of the defendant corporation."

2. It was not clearly shown that the acquisition was "desired for that purpose."

Allen contends the purchase was to get rid of a promising competitor and other competitors, including Allen, in the dealer field.

3. It was not clearly shown that the acquisifion "will not substantially lessen competition," with those words correctly interpreted.

As to this last, Cash maintained, consistently throughout the hearing, that what was meant by this phrase in Second (p) of the decree of February 1, 1916, was only present competition and competition between Cash and Allen-Wales. For example, in the opening statement (R. 69):

> "We claim that there is no present substantial competition and that, therefore, the elimination of any competition, if there should be any, will not substantially lessen competition."

and in the Further Statement on Behalf of Petitioner (R. 74):

> ". . . the Clayton Act deals with the acquisition of stock of one company by another where the effect of the acquisition will be to substantially lessen competition between the purchaser and the seller. And I submit to your Honor that this question about the effect on some little merchant is not in this case; it has got nothing to do with this decree or the Clayton law."

Again (R. 37):

> "Our position is, your Honor, that the only question before the Court is whether there is any substantial

competition between the corporation which is making the purchase and the corporation which is being sold, and if the result of the acquisition would be to substantially lessen competition between those companies.

"The Court: Yes. I understand the Government's opposition is limited to that, that you are opposing just on that ground alone."

and (R. 38, top):

"Mr. Moyer: Oh, the original complaint——

"The Court: ——I understand, but we are talking about the decree.

"Mr. Moyer. Provided it does not reduce competition.

"Mr. Graydon: Between the buyer and seller."

When Government counsel opposed this view and stated its position as based not only on the direct competition and on potential competition, but also the effect on competition at the distribution level (R. 37), the court indicated at the trial and in par. 5 (R. 18) of its findings, agreement with Cash's narrow and not permissible interpretation of Second (p) of the 1916 injunction. This view is the more clearly erroneous because Allen-Wales had only begun its growing competition in adding cash drawer machines with Cash's cash register a year or so before production of this commodity was suspended by war production in 1942 (R. 47 iv, 67). The Court's findings 3, 4 and 5 take no account of this (R. 18). Such interpretation is in conflict with opinions of this court, such as *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356-7; *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 224; *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466.

The past wrongdoings of the petitioner, its size (with sales in 1941 of over $48,000,000 in products (R. 68) and

its still continuing monopoly were not taken into account, as required by *United States* v. *Swift & Co.*, 286 U. S. 106.

In that case the court said (p. 116):

> ". . . size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past"

and (pp. 117-18):

> "Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave the fear unmoved today. . . . The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect."

and (p. 119):

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

According to this case, therefore, the burden of proof was on petitioner to show:

1. The danger from acquisition of competitors guarded against by injunction in the 1916 decree no longer existed, and

2. Under existing conditions it would be a grievous wrong to Cash if it were not permitted to acquire Allen-Wales. This burden was not met.

So, we repeat, acquisition should not have been permitted under any conditions. If this is so, since the Government has not appealed from the order of December 7, allowance of intervention should be ordered in order that there may be a setting aside or reversal of the subsequent decree allowing acquisition.

Allen is of opinion nothing short of refusal of leave to purchase will adequately protect it and other independents, and that the conditions in the decree do not sufficiently protect Allen and other dealers against restraint of trade and monopoly. The conditions are bound to be, to some extent, at least, a reflection of the erroneous view that because there may have been only slight competition between Allen-Wales and Cash, acquisition was permissible.

A decree permitting acquisition of Allen-Wales, no matter what conditions might be inserted, would not, in view of Cash's great size, practical monopoly and history of relentless suppression of competition, safeguard independent dealers (Allen's proposed answer, par. 21, R. 63). Independent manufacturers do not have the capital necessary to establish their own sales organizations. Therefore, they must depend upon the existence of dealers as practically the sole means of distributing their products. So long as Cash, with its large capital and sales organization does not invade the dealer field, there is equality of competition, both between the independent manufacturers for the dealer good will and between the dealers for the in-

dependent manufacturers' good will. While this equality exists, any independent manufacturer has the chance of entering new territory by meeting or bettering the terms which other independent manufacturers offer to dealers in it. But, if Cash takes away one of the dealers in a given territory by absorbing him into its sales organization, the competitive field between the independent manufacturers for the dealer good will immediately becomes affected by reduction in the number of dealers, to the detriment of the independent manufacturers. If, on the other hand, Cash takes over the Allen-Wales dealer and continues him as such for Cash, the equality of competition in the dealer field is also adversely affected; because Cash, with its tremendous resources, can offer terms to the dealer such as would put him on a competitive basis with the other dealers that would enable him either to drive them out of business entirely or seriously affect their ability to serve the independent manufacturers (R. 61-63).

The conditions put in the decree can be easily met or circumvented with resultant suppression of competition. Allen-Wales dealers will recognize that, under conditions A, B (R. 19-20) and E (R. 21), their life as such is limited to a few years at most. There will thus not be the same incentive for building up good will as if the dealer knew he could anticipate continuing as such indefinitely. But even before the period of Allen-Wales dealer franchise expiration, Cash can invade the field where it considers its representation inadequate or lacking. It can go into territory with its agents in which Allen-Wales has no representation and thus displace potential Allen-Wales dealers. Discrimination is not forbidden under F (R. 21), which seeks to guard only against "unfair or unreasonable discrimination." Cash agents can, therefore, be favored by Cash against Allen-Wales dealers in many ways. It

would be easy to give superior service to Cash agents over Allen-Wales dealers with plausible justifications for doing so. To show there was "unfair or unreasonable discrimination" would be difficult, and in some instances impossible. And yet it would exist. Cash is allowed to cancel before January 1, 1950, contracts with Allen-Wales dealers either (1) with the consent of the dealer (which could be obtained by offering him a favorable Cash agency or some other inducement), or (2) for claimed breach of the contract by the dealer. Doubtless the terms of these contracts are such as adequately protect Cash and would permit it to cancel for non-performance for lack of sales or violation of the contract in any way. While jurisdiction to enforce the decree is reserved by par. 10 (R. 21), dealers, for fear of reprisals, lack of financial strength or other reason, are not likely to invoke privileges conferred, either by incurring the expense of proceeding themselves or enlisting aid of the Government.

Allen, excluded from the case and having filed its appeal papers before the decree permitting purchase was entered, had no opportunity to study it critically or present objections to it or appeal from it. The Government has not appealed; perhaps because, although its answer requests that the petition be denied (R. 16), it is of opinion (erroneously, in Allen's view) the conditions are adequate for protection of independent dealers, or perhaps because having, in the course of the trial, assumed a non-adversary and merely advisory attitude, it would be inappropriate, if permissible, for a "commissioner" to appeal. The result is, therefore, unless Allen is permitted to appeal from the order refusing it intervention and the trial court is ordered to permit Allen to intervene, a decree in a matter of public importance, either totally erroneous in allowing acquisition, or insufficient in its protection against restraints of competition and monopoly, will become fully operative.

CONCLUSION

The appeal to this Court from the order refusing intervention should be sustained and the order reversed with directions to permit intervention. It is suggested, with deference, that should the Court reach this conclusion, the Court indicate, if deemed appropriate, that consideration, when acting anew on the petition for acquisition after intervention has been allowed, should be given not merely to 1941 competition between buyer and seller, but to potential competition and possible injury to the interests of all of the classes whom the particular restraint was intended to protect; also, that consideration should be given to whether the dangers that existed in 1916 from restraint and monopoly have disappeared and whether it would be a grievous wrong to change what was then decreed with consent; finally, that if a clear showing is not made by petitioner in all these respects, the findings and order filed December 7, 1943, should be set aside and the petition for modification of the decree be denied.

Respectfully submitted,

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APPENDIX

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. . . .